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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. fax	Sonia Sotomayor to Michael O'Conner re: Questionnaire (1 page)	06/24/1997	P2
001b. fax	Sonia Sotomayor to Michael O'Conner re: Questionnaire (1 page)	06/24/1997	P2
001c. fax	Sonia Sotomayor to Michael O'Conner re: Questionnaire (1 page)	06/24/1997	P2
001d. fax	Sonia Sotomayor to Michael O'Conner re: Questionnaire (1 page)	06/24/1997	P2
001e. form	Senate Questionnaire (49 pages)	n.d.	P2, P6/b(6)
002a. letter	Sonia Sotomayor to Michael O'Connor re: Questionnaire (1 page)	05/12/1997	P2
002b. form	Senate Questionnaire (28 pages)	05/12/1997	P2, P6/b(6)
003. form	Addendum to Senate Questionnaire (19 pages)	n.d.	P2

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Counsel's Office
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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

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[This is a very rough draft, with some original handwritten line edits, of a speech that was hastily typed on a laptop computer prior to delivery. I do not have a final, clean version of this speech.]

YALE LAW SCHOOL PREISKEL\SILVERMAN SPEECH
NOVEMBER 12, 1993

Doing What's Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service.

I was delighted to be invited to speak to you today. I have very fond memories of my time at Yale and returning is a pleasure, particularly when I am given an opportunity to discuss a topic for which I have a passion: public service, and which, I am gratified to see, the Law School has grown to appreciate. My years here were the transition years away from the social and political upheavals of the Vietman and the post Kennedy civil rights years. As a result, although at that time there was a core group of students involved in public service projects with Legal Aid and capital punishment cases, the clinical programs were very limited and the core group very small. I myself was more involved in purely academic pursuits with law journals than in public service concerns. As I have interviewed law clerks this past year, however, I have been delighted with the expansion in the variety of clinical programs at the law school -- the Mental Disability, Immigration, Greenhaven, Prisoner Rights, Homeless Advocacy, and Housing programs (I'm sure I've missed some and apologize) and I have also been impressed with the leadership role Yale has taken in work like the Haitian Refugee project.

Certainly, Yale's faculty has always and does provide intellectual challenges for its students. For some of us, the abstract study of law itself is fascinating. Nevertheless, it is exciting to combine intellectual engagement with social good and I

appreciate that the culture at the Law School must be much more stimulating on social issues than it was when I was here. It is always nice to see change for the better.

In very recent years the law school's leadership role in supplying our nation with public servants has been particularly noticeable. Yale has always done so. In my time, we had people like Cyrus Vance as Secretary of State. Now, however, the Law School has filled some very visible public positions like the Presidency of the United States, back-to-back, and the Supreme Court with its alumni. I am sure the publicity has not harmed Dean Calabresi's fund raising efforts or diminished the attractiveness of the law school to potential applicants. It is this very type of symbiotic relationship between public service and private benefit that aroused my interest in the topic I have chosen today.

The presence of our alumni in public positions underscores the fact that individuals with strong intellectual and income producing capabilities are often drawn to public work and service. Clearly, there is a drive and need in many such people to "do good" for others and it is a drive that motivates people to forego money -- for the ill-paying scale of public work is legendary -- and to endure the often disheartening frustrations occasioned by the limited resources generally available to government legal agencies and public interest law firms to do their work.

Recognizing the onerous burdens that choosing public service imposes, I hesitated in raising my topic -- Doing What's

Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service." My topic suggests that I am advocating an additional burdens to an already disadvantaged option and attempting to undermine one of its very few but very potent attractions -- the creation of contacts and knowledge which can later assist in private practice. I certainly do not want to discourage public work. Nevertheless, newspaper accounts are almost daily reporting on incidents that not only call into question the ethicacy of how private industry uses former public employees to lobby public entities but how public service lawyers exploit their former public positions or anticipated future positions to earn money in their private practice.

The Secretary of Commence Ron Brown's actions have starkly illustrated my point. Mr. Brown before leaving his very prestigious Washington law firm to join the Clinton administration, wrote to his clients to bid them adeau, In the process he reminded them of his new appointment and of the competence of his partners to serve their needs, He also invited them to stay in touch with him and visit him. Mr Brown has also chosen not to recused himself as Secretary from involvment in issues that effect companies who retain his former law firm. As an aside, I might mention that Mr. Brown's son has been hired by a lobbying firm with a clientele similar to that for which Mr. Brown had worked. Mr. Brown's actions in protecting his income-producing potential after he leaves the government has been very direct and well publicized. I do not address here any potentially illegal actions like the recent

Justice Department's investigation of Mr. Brown about an allegation that he has accepted payment in return for attempting to influence US policy on Vietman. That type of conduct is clearly controlled by legal standards. My focus ius not what is already within the law, although I will allude to it in order to mark our starting point, but my question is where should we place the ethical line at which self-promotion for future benefit should be placed.

We should be careful in judging Ron Brown because he may simply be unapologetic about a reality that is an integral part of public service. In fact when questioned about his lobbying during his confirmation hearings, he off handedly retorted that it only proved he was an effective advocate. The major elect of New York City, Rudy Guiliani, a former US Attorney was hired by three laws firms after his initially failed run for major four years ago. The three law firms paid him and an assistant about half a million dollars a year to join them. At none of the firms did he generate that much in client billing and this, MAY account for his leaving two of those firms. However, it was an interesting investment for the law firms that are not lobbyist in the Washington sense and also unquestionably a very generous perk of public service for Mr. Rudy Guiliani when he had to make a living in the private sector. Similar to the major-elects story, when Robert Abram attorney general of NYs decided to leave public service after more than two decades, he was hired by one of the premiere law firms of NYC to develop business with the former Soviet Union countries. Now, Bob Abrams for the last eight years has run a state office and prepared a failed campaign for the Senate. I'm impressed that he had the time to develop skills and contacts with the former eastern bloc.

These are very direct examples of how public service is exploited in private practice. Some of you may want to argue that

these examples are titilating but that they should not drive the discussion of ethical rules because this level of benefit from former public service is limited to just a few, elite public officers. To the extent that common ~~folks~~ people can exploit their former positions, well, there generally are laws which control those situations. For example, President Clinton has passed an executive order that his executive aides must commit to not lobbying before government agencies which they supervised for five years. SImilarly, most government agencies in most cities and states bars, for lawyers from working before the agency that had employed them, ~~for at least two year.~~ at least two years. However, these rules simply address the more blatent forms of exploitation of public service. They do not address the more subtle forms.

For those of you who may not realize it, government agencies like Legal Aid societies, United States Attorneys Offices and District Attorneys offices often forge personal relationships that exist for lifetimes and those relationships influence appointments to other government jobs as well as the swapping of business in private practice. This is contact building at its best and most subtle because it doesn't implicate lobbying but it does implicate involve private gain.

I draw on a personal example to illustrate my point and to underscore that this subtle exploitation of past public service is ~~not a question without significant~~ as quite importance to both the individaul involved ~~but~~ and to our society, ~~in general. The consequences are important~~. As you know, I started my legal career with Robert

Morgenthau office, Manhattan's District Attorney's ~~office.~~ When I left there I went into private practice. I did not practice criminal law at my firm so I did not have the opportunity there to exploit the knowledge of criminal law and the criminal justice system that I had acquired. Nevertheless, my prior association with Mr. Morgenhau did assist in my appointment while in private practice to serve on a number of public committees -- the NYC Campaign Board, the New York State Mortgage Agency Committee, the Governor's task force of race and cultural relations, and on PRDLEF, The work for the DA"s office in combination with the presitge of my partnership in a firm that specialized in international busiess law made me an attractive candidate for public service on boards and ~~directors~~. of these types of organizations I took personal pride that I never attempted to draw on my work for these ~~projects~~ organizations to generate work for my firm. I never accepted appointment to a committee involved in any of my firm's specialities and I did not have my partners try to develop new business in the public service areas in which I was involved. Needless to say, some of my partners felt that my decisions were as a bit counter~~intuitive~~ productive for them and somewhat burdensome. ~~for the firm.~~ My contributions of time to public service was obviously at the expense of my firm. Despite a standard that most lawyers do not adhere to, I am not pristine and do not intend for you to conclude so. When Senator Moynihan's committee reviewed my qualifications for the federal bench, they spoke to all of the people I served with on these various boards ~~with~~. Equally significant, all these people -- participants in the public service arena -- in turn were friends

with the people who sat on the Senator's committee--those people too were public interest veterans. Who knows, ~~who~~, who knows who? Now, there is nothing inherently wrong in people who know you giving recommendations. I suspect almost everyone would agree. However, remember that in private practice this process resulted in my being able, for a very personal gain, to exploit my public service to get a very attractive job. The process of patronage appointments in government is well known as is the ills it occasions. But, is the sublte benefit of having people know you who are influential any less dangerous than direct patronage? Is the most qualified person the one who knows the decision makers and has impressed them for whatever reason? How does the really smart lawyer with extraordinary legal skill equalize the field and get selected on merit? Now, like with all these issues, the question gets fudged and lost in the quagmire of how do you define "qualified." Some would say that an individual whose talent hasn't come to the attention of others may not have all the necessary skills for a public position. But this type of answer begs the ~~question~~ and doesn't address how one could minimize influence. Assuming obviously, however, that one has accepted the proposition that the influence of who you know is an ill, how do you control it?

~~For many years,~~ most governments and good government groups have centered their attention on controlling the contributions of special interest groups, generally businesses and corporations, to political campaigns and in limiting the lobbying efforts of former public employees immediately after they leave

office. For example, we have the Federal Elections Law and many states, and cities, including New York City have passed comprehensive laws not just limiting contributions to campaigns but imposing extensive reporting requirements about both expenditures and contributions. We have federal laws on lobbyist reporting their work and contributions and on elected officials accepting payments or benefits from lobbyist. All the complicated and extensive ethics and conflict laws and regulations, however, are generally not enough fully to address the subtle forms of public service exploitation in private practice.

I will be drawing many examples brought to my attention on this issue by my prior service on NY City's Campaign Finance Board. I was a founding member of that Board and participated in formulating NYCity's comprehensive regulations on campaigns. I served on the Board with pride until my appointed to the bench. NYCity's campaign rules have been praised and touted as examplery by many good government groups. My experience on this Board taught me some very important lessons. No matter how stringent and detailed your rules might be, those intent on evading them will manage to find a way and those intent on breaking them will. For example, NYC's campaign law limits not just contributions to but expenditures by campaigns. Exempted from the campaign expenditure limit are those expenses related to complying with the law. In this last election in NEw York City, Mayor Dinkin's campaign was investigated because they attributed to this exemption a very high percentage of the salaries of some of their most costly campaign

workers, like the Campaign Manager. Now I was not a member of the Board during this investigation and am only relating what I have read in the papers, but the Board disallowed these deductions and fined the Dinkins campaign over a quarter of million dollars for false reporting. This is not an insignificant amount when your limit for the entire campaign cycle is only about, if I recall correctly, 4mil, and you are in the last week of a close race. The Board has announced that it is now thinking of passing a rule that would limit the campaign law compliance exemption to 15% of total expenditures. Again, I do not suggest that the Dinkins campaign intentionally broke the law, I simply point out that for every ethics rule some one will seek a way around it.

Ethical rules by their very nature are generally self-regulating. Few organizations or agencies have the resources to investigate fully the panoply of ethical violations that arise. The rather limited success of bar associations in monitoring our profession is a testament to this failure. Just last year, New York State's insurance reimbursement to victims of legal malpractice totalled over, I believe, 10 million dollars.

~~Those bent to break ethical guidelines are rarely caught.~~ Now, influence peddling is rarely committed to writing or visible. While on the City's Campaign Board, I was disappointed to learn that a partner in a major City law firm had arranged to have a number of his partners give contributions to a campaign and then had the firm reimburse the partners for their outlay. Our ~~Borad's~~ Board's law limited the contributions a partnership or a corporation could

make, therefore, by having the individual partners write checks, the firm's contributions limits were ignored. The law firm was investigated by the NY CIty District Attorney's office and ultimately reached an agreement where it was not prosecuted in exchange for paying a fine of over 100, 000. Now, at moments I wasn't sure whether I was disappointed because members of our bar were implicated in a charge of intentionally seeking to violate laws or whether I was disappointed that they were so ignorant in how they went about their actions. Issuing their partners back-to-back checks for contributions given to the campaigns seemed rather unsophisticated. The episode, however, made me realized that it would have taken very little for the firm to evade the law, it simply could have waited until the end of year and silently incorporated contributions into its compensation calculations for its partners

Well do these limitations in policing ethical rules mean ~~suggest~~ that we shouldn't have them? Absolutely not, despite the burdens imposed by such rules and even in the face of their non-enforcement history, ethical rules set the parameters of what we as a society find acceptable. In all human pursuits, we have to rely on the good will of the participants in our endeavors. No one has the resources to enforce all laws. By having rules, however, we stimulate discussion and we stretch ourselves to improve our commitments to our goals. Accordingly, I excuse my selection of my topic today by pointing out that the rules I ask you to think about are not intended to scare you away from public service. Neither do I

believe the rules should be thought of as burdens on public service. Instead, I encourage you to accept the consideration of them to inform your conduct as you make choices in the future of what limits you will set upon yourselves when you leave public service and begin earning a living.

Among the campaign promises that President Clinton has had difficulty in achieving, has been in honoring his commitment to pass ethical rules for his administration which would be the most exacting of their kind. Now, the President has passed rules which are much more comprehensive than his predecessors. Nevertheless, with many private business candidates indicating they could not accept a place in his administration if the broad rules he originally proposed were passed, President Clinton had to reduce the scope of his rules. SO, from an original proposal that would have barred an administration employee from lobbying for five years before any federal agency, the new executive order he passed bars lobbying only from those agencies an individual supervised. The rule, however, does not prohibit the aide from working for an organization that does lobby in this way, but only limits his or her personal lobbying efforts. The way around this rule is self-evident. As the NY times observed "remote control" lobbying is almost impossible to detect and can be done without violating the letter of the rule, although it might violate its spirit. For example, the rule does not appear to prohibit a former agency employee from explaining to a colleague how the public aspects of his former agency operate.

Not just lobbying is controlled by regulation for a period of time but other typical rules bar lawyers from arguing cases or handling cases before agencies they have worked with for a period of time. However, just like remote control lobbying, this rule does not control the influence and benefit of not who you know but what you know about government regulations and rules. Although Most government rules bar appearance before an agency for a period of time, the rule doesn't bar the attorney from giving clients legal opinions or from exploiting the special knowledge imparted by working in any area of the law while in public service. This may account for why so many lawyers who practice tax law were IRS agents. Recognizing that particularly for lawyers their is an advantage solely in specialized knowledge, should we be limiting their ability not just to practice before an agency but to practice in an area at all for a period of time? How long is enough? Should time measure it or if not, what circumstances. Do we consider evening the playing field by keeping a player out all together. Now, there is the argument that a public service employee was disadvantaged by poor pay for a period of time, and should not be kept from making a living for a longer period. However, the presumptions of that argument may be changing in our society. With the recession, for example, many mayor law firms have reduced their staffs. With that reduction has come a very talented pool of individuals to the public world. But there as well, jobs are limited and can one, in a recessive economy, really say that anyone who has had a job at all is "disadvantaged" because pay is low? I

doubt the unemployed lawyers out their would agree.

Well, what is wrong with special knowledge about a field? In a vacuum, nothing, but where does the possession of that knowledge unfairly disadvantage an opponent and isn't the public weal harmed when those who have served it, denigrate it by manipulating it. I venture no opinion on right or wrong here, I simply raise the question and ask whether recognizing the question, the bars in private praction should be broader than they now are. Should you bar lawyers from practicing in their specialty? Should that bar be total for the government entity with which an attorney worked so that the lawyer shouldn't work for a firm that does practice before that agency? How far the bar?

And, what do we do about sublte influence. There are many government entities, for example, who now put out their legal work for bidding. Yet, lawyering is a service which has very little objective criteria for measurement, You can ask a law firm how many cases have you handled in this area of the law but the inquiry has limited value because it tells you nothing about the complexity or quality of the cases handled. I can assure you that multimillion claims are often less complex than the habeas cases that come before me. Thus, bidding has its disadvantages for the public weal and in any event, it is not a fool proof way of controlling influence. Who gets invited to bid sometimes depends on who know who and knowledge imparted between friends on how to attractively structure a bid is valuable information. Finally, in close bids, a former agency employee whose talent is known, still

has an advantage. Is there something wrong is giving or selecting a friend whose work we know to be good something bad? Why do we usually say no. Most lawyers send work to law shcool friends and for sure, lawyers often send work to people they worked with in public service. Do we control that -- how? Should we bar it? Should we have rules requiring that people on selection committees for granting jobs or appointments never review the application of friends. Should you require selection committees to set forth their prior experience with an applicant who they are proposing. Should you require selection committee members from involving themselves at all in a process in which they know a lead contender? How do or do you want to make up for personal knowledge gained through public service. When and where?

I started my saying that I was a proponent of public service. Doing good for people is generally the highest reward of public service. It would be naive and disingenuous for anyone to argue that all use of the knowledge and contacts developed in public service should be outlawed. Use of public service in private practice is not and should not be a "dirty" thing. As I explained earlier, while at Yale, I went through a fairly traditional career - I did journal, I worked for a big law firm, I was interviewing till almost the end exclusively with firms. Fortuitously, one evening I was leaving the library when I smelt food in a conference and I walked in. A panel on public service job alternatives was going on and Robert Morgenthau, the DA of Manhattan and former US ATTorney of the Souther District of New York was speaking. He was

describing the work of his office, and at the end of his speech in which he had touted the importance of the work, its challenge, etc, he said to the group that he could promise anyone that came to work for him the greatest amount of responsibility and the power to exercise it in cases at an earliest point of our careers. He predicted that it would be years before anyone who left his office would be given as much responsibility and no other lawyers out of school would be given comparable experience. Having just spent a summer working in a big and famous law firm, and having watched a seventh year associate worked almost 72 hours straight on a temporary restraining order and then seeing the partner briefed for an hour argue the case, Mr. Morgenthau convinced me I was on the wrong track. I spoke to him that night, interviewed with him the next day and he invited me to NY. I went and at the end of the day, he offered me a job, I ~~thought~~ took it and have never regretted the decision. ~~The path he gave me~~ has led to my ~~doing~~ having the best job any lawyer could ever have--being a judge, and particularly a federal judge. What Bob Morgenthau didn't tell me was that the alumni from his employment populated all levels of government, that my co-workers over time would rise to high levels of government and that the friendships I formed in my work in his office and by my association with him would be important the rest of my life. This is important for you to know and what is equally important to appreciate is that the process has great value. Part of that process, however, is recognizing that we should not abuse it and should, as part of our commitment to our ideals, strengthen by

thought and discussion the close questions. I hope you are not disappointed by my not presenting a detailed ethics proposal. I did not do so because groups like Common Cause spend their time developing those proposals and they are a better source for specific ideas. My intent was to stimulate your thought about these issues and to invite you to give them thought as you choose among your career options now and later in your lives. Thank you for having me.

I need only point to the heart breaking example of Elizabeth Holtzman, the former Congresswoman who rose to stardom during the Watergate Congressional investigation and who is soon to be former Comptroller of the City of New York. Ms. Holtzman's political career of twenty-five years has been halted by the taking of a political contribution from a bank whose affiliate was actively seeking and subsequently was granted by Holtzman's office a significant part of the city bond business. There are many questions concerning the Holtzman situation and I do not mean to imply that she violated any laws or even any ethical rules, but I use her example only to suggest that the fine line between public service and private interest is always a close one.

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RETURNING MAJESTY TO THE LAW AND POLITICS: A MODERN APPROACH

Hon. Sonia Sotomayor and Nicole A. Gordon

Returning Majesty To The Law and Politics: A Modern Approach*

Hon. Sonia Sotomayor† and Nicole A. Gordon††

Even after participating in many different aspects of the practice of law, it is still possible to retain an enthusiasm and love for the law and its practice. It is also exciting to address future lawyers about the practice of law. This is not easy to do, unfortunately, in the context of recurring public criticism about the judicial process.[1]

The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is "correct" is often difficult to discern when the law is attempting to balance competing interests and principles, such as the need to protect society from drugs as opposed to the need to enforce our constitutional right to be free from illegal searches and seizures.[2] A con-

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1. *See, e.g.*, Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at A1 (describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association); John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8 (asserting damage manufacturers have done to society is "trivial" compared with harm lawyers do); Don Van Natta Jr., *Group Urges More Scrutiny For Lawyers*, N.Y. TIMES, Nov. 10, 1995, at B1 (discussing recommendations for improving legal system and combatting public criticism by Committee on the Profession and the Courts assembled by New York State's highest court).

2. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH

fused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.[3]

Unfortunately, lawyers themselves sometimes feed that cynicism by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases.[4] Similarly, instead of attempting to control criminal or unethical conduct occurring in our profession and promoting the honorable work of most of us, many lawyers respond by denigrating the professionals in certain practice areas, like personal injury law. Further, many neglect to focus on the core issues that rightly trouble the public, such as whether there is fraud and deceit in the prosecution of claims, and if so, what we should do about it.

Today, we will discuss how we can satisfy societal expectations about "The Law" and help create a better atmosphere in which public officials, and especially lawyers and judges, can inspire more confidence and respect for the "majesty of the law" and for the people whose professional lives are devoted to it.

I. THE LAW AS A DYNAMIC SYSTEM

The law that lawyers practice and judges declare is not a definitive, capital "L" law that many would like to think exists. In his classic work, *Law and the Modern Mind*, Jerome Frank aptly summarized the paradox existing in society's attitude toward law and its practitioners:

> The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.
>
> Respect for the bar is not difficult to explain. Justice, the protection of life, the sanctity of property, the direction of social control—these fundamentals are the business of the law and of its ministers, the lawyers. . . .
>
> But coupled with a deference towards their function there is cynical disdain of the lawyers themselves. . . . The layman, despite the fact that

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AMENDMENT (3d ed. 1996) (explaining that exclusionary rule protects constitutional right to be secure against unreasonable searches and seizures).

3. *See Judge Baer's Mess*, N.Y. TIMES, Apr. 3, 1996, at A14 (criticizing federal judge's reversal of initial exclusion of drugs and confession as unconstitutional seizure). According to one editorial, "[o]ne of the major troubles with most lawyers is that they actually believe their profession is making the United States a better place to live." *Time For Real Legal Reform Is Now, Before Lawyers Bring Nation Down, Series: The Trouble with Lawyers*, FT. LAUDERDALE SUN-SENTINEL, Jan. 4, 1996, at 14A.

4. *See* Max Boot, *Stop Appeasing the Class Action Monster*, WALL ST. J., May 8, 1996, at A15 (detailing how corporate mass-tort defense lawyers criticize class actions yet offer few alternatives or solutions).

> he constantly calls upon lawyers for advice on innumerous questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane.[5]

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism," postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, [and] subject to incalculable changes," while the public instead needs and wants certainty and clarity from the law.[6] Because a lawyer's work entails changing factual patterns presented within a continually evolving legal structure, it appears to the public that lawyers obfuscate and distort what should be clear. Frank, however, pointed out that the very nature of our common law is based upon the lack of certainty:

> The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.*[7]

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by acceding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that the law is not fixed and that change in the law is inevitable and to be welcomed: "Without abating our insistence that the lawyers do the best they can, we can then manfully [sic] endure inevitable short-comings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible."[8]

Frank's thesis, set forth in 1930, should continue to attract examination today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction entirely, as when *Brown v. Board of Education*[9] overturned *Plessy v. Ferguson*,[10] or as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed "caveat

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5. JEROME FRANK, LAW AND THE MODERN MIND 3 (Anchor Books 1963) (1930).

6. *Id.* at 5. In the preface to the sixth printing of LAW AND THE MODERN MIND, Frank took issue with the notion that his theories and their advocates constituted a school. *Id.* at viii-xii. Instead, Frank preferred to be viewed as a "factual realist" or as he described himself, a "fact skeptic," as opposed to a "rule skeptic." *Id.* at xii.

7. *Id.* at 6-7 (footnotes omitted).

8. *Id.* at 277.

9. 347 U.S. 483 (1954).

10. 163 U.S. 537 (1896).

emptor."[11] As these cases show, change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.

Lawyers must also continually explain the various reasons for the law's unpredictability. First, as Frank describes, laws are written generally and then applied to different factual situations.[12] The facts of any given case may not be within the contemplation of the original law.[13] Second, many laws as written give rise to more than one interpretation (or, as happens among the circuit courts, differing or even majority and minority views).[14] Third, a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction.[15] Fourth, the function of the law at a trial is not simply to provide a framework within which to search for the truth, as understood by the public, but it is to do so in a way that protects constitutional rights.[16] Against these and other constraints, including, as Frank observed, an unknown factor—i.e., which version of the facts a judge or jury will credit—competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients.[17]

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11. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-96, at 677-83 (5th ed. 1984) (outlining movement from notion of caveat emptor to liability for losses caused by defective products); RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (detailing common law evolution of liability for defective products).

12. *See* FRANK, *supra* note 5, at xii (describing how courts apply legal rules to unique cases).

13. *See id.* at 127-28 (criticizing mechanistic approach to law that would treat people like mathematical entities to achieve predictability).

14. *See id.* at 121 (discussing statistical evidence concerning differences among judges).

15. *Cf.* Jeremy Paul, *First Principles*, 25 CONN. L. REV. 923, 936 (1993) (discussing how cases of first impression force judges to create law and affect law's unpredictability).

16. *See* United States v. Filani, 74 F.3d 378, 383-84 (2d Cir. 1996) (discussing varied goals of the trial in American jurisprudence). In *Filani*, the United States Court of Appeals for the Second Circuit considered a drug conviction based on the judge's improper questioning of the defendant. *Id.* at 382-83. In discussing the history and role of trial judges in England and the United States, the court stated:

> One of the reasons for allowing an English judge greater latitude to interrogate witnesses is that a British trial, so it is said, is a search for the truth. In our jurisprudence a search for the truth is only one of the trial's goals; other important values—individual freedom being a good example—are served by an attorney insisting on preserving the accused's right to remain silent or by objecting to incriminating evidence seized in violation of an accused's Fourth Amendment rights. The successful assertion of these rights does not aid—and may actually impede—the search for truth.

Id. at 384.

17. FRANK, *supra* note 5, at xiv-xv. Of course, there are many instances in which lawyers *can* predict reliably what the outcome of a particular case will be. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 83-86 (1995) (analyzing systemic pressures to plea bargain in criminal cases). Cases that reach the trial stage do not reflect the multitude of cases that are resolved early—even before the complaint stage—precisely because the parties have quite a clear expectation of how their cases would be decided. *See id.* at 83

This necessary state of flux, as well as our reliance on the adversary system, give rise to a cynicism expressed by Benjamin Franklin in the mid-seventeen hundreds, but equally reflective of the public mood today:

> I know you lawyers can with ease
> Twist words and meanings as you please;
> That language, by your skill made pliant,
> Will bend, to favor every client;
> That 'tis the fee limits the sense
> To make out either side's pretense,
> When you peruse the clearest case,
> You see it with a double face. . . .
> Hence is the Bar with fees supplied;—
> Hence eloquence takes either side. . . .
> And now we're well secured by law,
> *Till the next brother find a flaw.*[18]

This image raises perhaps the greatest fear about the role of law and lawyers: that on the same facts, and presented with the same law, two judges or juries would reach different results in the same case because of a lawyer's presentation.[19] Whether the concern is that only the wealthy can afford the best lawyers, or simply that the more "eloquent" attorney can get a better result, it is an intimidating possibility to a public that seeks certainty and justice from the law. From the vantage of a judge, however, it is not a correct or complete picture of what happens in the courtroom. To the extent judges and juries reach different results, much, as Frank observed, may be attributable to the fact that judges and juries react differently to facts because their life experiences are different.[20] Working from the same facts and within the confines of the same law, however, it seems that gross disparities in result do not frequently occur.[21] But the law does evolve, and to assist its evolution and at the same

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(noting some defendants readily admit guilt and acknowledge responsibility for wrongs committed).

18. Benjamin Franklin, *Poor Richard's Opinion*, *in* LAW: A TREASURY OF ART AND LITERATURE 151, 151 (Sara Robbins ed., 1990).

19. *Compare* BMW v. Gore, 116 S. Ct. 1589, 1592-94 (1996) (considering constitutionality of $2 million punitive damages award for undisclosed automobile paint repairs), *with* Yates v. BMW, 642 So. 2d 937, 938 (Ala. Civ. App. 1993) (noting jury in virtually identical Alabama fraudulent car repainting lawsuit awarded no punitive damages), *cert. quashed as improvidently granted by* 642 So. 2d 937 (Ala. 1993).

20. *See* FRANK, *supra* note 5, at xii-xiii (recognizing judge and juries bring personal prejudices to trials). In extreme cases, of course, a lawyer (or a judge or jury) can be entirely incompetent or otherwise entirely fail to do a proper job.

21. This conclusion is based both on personal experience as a judge and on the statistically small number of jury verdicts set aside or new trials ordered by judges. Of course, case law principles require that appellate courts give jury verdicts a great deal of deference. *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2336-38 (1994) (stating civil jury verdicts are historically afforded deference on judicial review unless damages too large); United States v. Powell, 469 U.S. 57, 67 (1984) (commenting

time maintain their own credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Ben Franklin's description is correctly derisive.[22]

Frank's point that the public fails to appreciate the importance of indefiniteness in the law must be addressed through better education of the public by lawyers and others, including government officials.[23] In addition, the public has other needs relating to the law: the need, for example, for lawyers to act honorably, beyond what any law, regulation, or professional rule may require. This need requires a different response.

II. MORALITY IN PUBLIC SERVICE

What are our expectations of lawyers, judges, and of public servants generally? Over the years, the response to scandal and disappointment in lawyers and in our public officials has varied. A history of ethical codes that have apparently not provided sufficient guidance to practitioners has recently led to tighter restrictions. In the public sphere, we have for some time been engaged in passing laws and regulations intended to curb unworthy behavior. This may not always be adequate for public officials or for lawyers. Some would argue that reliance on regulations alone defuses the notion of personal responsibility and accountability.

Charles Dickens on a visit to the United States in the nineteenth century described his sorrow when confronted with the American approach to regulating gifts to public servants:

> The Post Office is a very compact and very beautiful building. In one of the departments, among a collection of rare and curious articles, are deposited the presents which have been made from time to time to the American ambassadors at foreign courts by the various potentates to whom they were the accredited agents of the Republic; gifts which by the law they are not permitted to retain. I confess that I looked upon this as a very painful exhibition, and one by no means flattering to the national standard of honesty and honour. That can scarcely be a high state of moral feeling which imagines a gentleman of repute and station likely to be corrupted, in the discharge of his duty, by the present of a snuff-box, or a richly-mounted sword, or an Eastern shawl; and surely the Nation who reposes confidence in her appointed servants, is likely to be better served, than she who makes them the subject of such very mean

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that deference to jury's collective judgment brings element of finality to criminal process); Binder v. Long Island Lighting Co., 57 F.3d 193, 201-02 (2d Cir. 1995) (finding appellate court grants "strong presumption of correctness" when reviewing whether jury verdict is "seriously erroneous").

22. Franklin, *supra* note 18, at 151.

23. *See* Roberta Cooper Ramo, *Law Day More Important than Ever for Keeping Strong*, CHI. DAILY L. BULL., Apr. 27, 1996, at 8 (emphasizing importance of legal profession keeping citizenry well informed about Constitution and legal system).

and paltry suspicions.[24]

There is indeed a national plethora of legislation at every level of government restricting activities of government officials.[25] This legislation, among other things, controls the receipt of gifts; limits outside employment and the amounts of fees and honoraria; restricts post-employment contact with government; curbs the extent of political activities; requires the acceptance of the lowest (but not necessarily best) bids on government contracts; and sets prohibitions on the manner and ways in which to address financial and other conflicts. These rules are extremely important, even vital, notwithstanding Dickens' eloquent statement to the contrary. They protect the public from many kinds of inappropriate influences on government officials, and they perform another crucial service in providing guidance to and protecting those they regulate. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes.[26] If specific rules have their place, however, that does not mean that we should limit the standard we apply to public officials to the technical question whether those rules have been broken, rather than aspiring to the highest in moral behavior. As a "Nation," we have not sufficiently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we overemphasize social morality, concentrating on personal scandals that we cannot regulate, and then pass detailed rules, hoping to elevate professional behavior in that way. If we limit our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

In other countries, professional morality is approached differently. In Europe, for example, public officials often have greater discretion, are better paid, and are held to higher standards of behavior, in some instances resigning their office if there is the hint of financial scandal in their work.[27]

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24. CHARLES DICKENS, AMERICAN NOTES AND PICTURES FROM ITALY 123 (Oxford Univ. Press 1957) (1842). It is interesting that in England there is now a heightened sense that laws or rules are in fact needed to regulate the behavior of public officials. *See* COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIRST REPORT, 1995, Cmnd 2850-I, at 3 (urging remedial legislative action to counter public discontent with ethical standards of public officials).

25. *See generally* COUNCIL ON GOVERNMENTAL ETHICS LAWS, THE COUNCIL OF STATE GOV'TS, COGEL BLUE BOOK (9th ed. 1993) (compiling information on laws governing campaign finance, ethics, lobbying and judicial conduct nationwide).

26. *See* Jane Fritsch, *The Envelope, Please: A Bribe's Not a Bribe When It's a Donation*, N.Y. TIMES, Jan. 28, 1996, at D1 (describing subtle distinction between illegal bribes and legal campaign contributions to politicians); Stephen Kurkjian, *Ferber's Conviction Spurs Widening of Probe*, BOSTON GLOBE, Aug. 15, 1996, at B5 (reporting planned investigation of Massachusetts politicians after corruption conviction of former financial advisor to state agencies).

27. *See generally* Mark Davies, *The Public Administrative Law Context of Ethics Requirements*

The tolerance in this country for questionable behavior by public officials is illustrated by the persistence of extremely troubling—but legal—practices in the public arena. In one of the murkiest and least well-controlled areas, we find ourselves debating what the quid pro quo's are for campaign contributions. Here we have abandoned standards we would surely apply in any other context. We would never condone private gifts to judges about to decide a case implicating the gift-givers' interests.[28] Yet our system of election financing permits extensive private, including corporate, financing of candidates' campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.[29] Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions.[30] As Congress revamps many questionable practices, including the receipt of gifts from lobbyists, it must monitor to the public's satisfaction both whether inappropriate activity is being left unregulated and whether laws and regulations that are put in place are actually enforced. The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.

Similarly, the public wonders whether lawyers have enforceable rules of self-government or any kind of defined professional morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific, troubling situations. For example, almost all professional codes require that a lawyer should represent a client zealously within the bounds of the law and may not suborn perjury or the creation of false documents.[31] But no rule guides a lawyer who is

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for West German and American Public Officials: A Comparative Analysis, 18 GA. J. INT'L & COMP. L. 319 (1988) (detailing differences between ethics regulations for American and German public officials).

28. *Cf.* Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 194 (1996) (discussing Texas attorney Joe Jemail's $10,000 campaign contribution to judge in Texaco-Pennzoil case).

29. *See* Fritsch, *supra* note 26, at D1 (reporting influence of special interest money as serious political issue).

30. *See* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994) (proposing replacement of federal election finance system with total public financing of congressional campaigns).

31. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1995) (noting candor toward tribu-

merely left with a firm and abiding conviction that what is being said or proffered by a witness or client is false. Rules might be ill-suited to answer such dilemmas, but moral imperatives, or what Lord Moulton described in 1924 as "Obedience to the Unenforceable," may be more helpful.[32]

Lord Moulton, to be sure a man of his time, spoke of Obedience to the Unenforceable as a standard that people live up to despite the fact that no law can force them to do so.[33] He gave as an example the conduct of the men aboard the Titanic who, facing imminent death, nevertheless adhered to the principle that women and children should be saved first:

> Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners. . . . The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.[34]

Our public officials and lawyers should also be prepared to adopt a culture that depends upon subjective accountability as well as on well-defined, consistent rules and regulations:

> The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.[35]

III. THE BAR'S RESPONSIBILITY

What is the responsibility of a practicing lawyer, and how can lawyers' behavior be changed in ways to encourage greater respect for the legal profession? To take one example of a tolerated but unacceptable pattern, let us examine the lying and misrepresentation that occurs in court.

Some number of witnesses in court lie, including some for the prosecution and some for the defense, and their lawyers suspect as much. Lawyers are not, however, routinely confronted with the clear-cut dilemma

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nal prevents lawyer from offering false evidence); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-6 (1983) (declaring lawyer's duties to client and legal system).

32. Lord Moulton, *Law and Manners*, ATLANTIC MONTHLY, July 1924, at 1, 1. Lord Moulton, a judge and member of the British Parliament, served as Minister of Munitions for Great Britain at the outbreak of World War I. *Id.*

33. *Id.*

34. *Id.* at 4.

35. PIERO CALAMANDREI, EULOGY OF JUDGES 45 (John Clarke Adams & C. Abbott Phillips, Jr. trans., 1942).

that a client proposes to "lie" on the stand. A client presents a version of the facts, and lawyers rarely have independent, first-hand knowledge of them. (In criminal cases, clients frequently choose not to take the stand, often on the advice of an attorney, advice that is given for any number of reasons, including the risk of presenting perjured testimony.) What more commonly occurs is that witnesses, often unconsciously, allow selectivity, prejudice, and emotion to color their perceptions. Even when two witnesses directly contradict one another, both may be "telling the truth" from their own points of view or to the best of their recollection. Real life is complex, and we have chosen to use the adversarial system to sort out the truth as best it can.[36]

To maintain credibility in the system, however, we must study how well we do in fact get at the "truth."[37] Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because each side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood.[38] But the adversarial system may not always be wholly adequate to the task of exposing wrong-doing and false or inflated claims. Empirical studies have been performed, for example, that examine the reliability of witnesses and jurors.[39] Many factors influence witnesses and juries, including subconscious racism and other prejudices. As a profession, we should seek, based upon empirical evidence, ways in which to improve our ability to arrive at the truth. If we undertake this seriously, we will not only do well by the cause of justice, but we will justifiably improve the public's opinion of our profession.

The adversary system may also be ill-suited to resolve certain types of disputes such as those presented by "battles of the experts" in medical malpractice and many other kinds of cases. There is recurring debate about the ability of jurors to evaluate such evidence. The Supreme Court of the

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36. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 158-59 (1978) (analyzing how adversary system sometimes encourages attorneys to argue credibility of clients who have made knowingly perjurious statements).

37. *See* Marvin E. Frankel, *The Search for Truth—An Umpireal View*, 30 REC. ASS'N B. CITY N.Y. 14, 15 (1975) (arguing that the "adversary system rates truth too low among the values that institutions of justice are meant to serve.")

38. *See* FED. R. CIV. P. 26-37 (setting forth rules governing depositions and discovery in federal civil cases); FED. R. CRIM. P. 16 (establishing rules of evidentiary disclosure by both government and defendant in criminal cases); FED. R. EVID. 607 (allowing impeachment of witness' credibility).

39. *See generally* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987) (presenting social scientific research on jury behavior and persuasion); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988) (analyzing jury reliability and phases of jury trial); Christopher M. Walters, Note, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985) (discussing expert witness reliability in eyewitness identification cases).

United States, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[40] has reacted to this debate by expanding the judge's function to require that scientific testimony be evaluated more stringently before it can be presented to a jury.[41] Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another desired bedrock, the certainty of science. We must revisit whether other methods of inquiry into specialized areas—such as the use of court-appointed experts or Special Masters who share their conclusions with juries—may be more useful to resolve these kinds of disputes. The current system, in this particular respect, should somehow be made to work better or should be critically evaluated, and if necessary, replaced.

Finally, the adversary system, almost by definition, cannot address the gray area of the "truth" present in most cases because the system tends to produce all-or-nothing winners and losers. This is why settlements and new forms of "alternative dispute resolution" are so important.[42] Dickens' remark that honorable lawyers admonish their clients to "[s]uffer any wrong that can be done you, rather than come here [to the courts]," is still timely for many litigants.[43] The adversary system has its limitations under the best of circumstances, including the limitations it places on the judges' role, and so we must explain why the benefits of the system outweigh those limitations.[44] If, as has been said of the democratic form of government, the adversary system is "the worst . . . except [for] all those other forms," then that is the way in which the public should understand it: not as a system expected to accomplish more than any system can.[45]

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40. 509 U.S. 579 (1993).

41. *See id.* at 597 (acknowledging Federal Rules of Evidence require judge to ensure scientifically valid principles support expert testimony).

42. *See* Abraham Lincoln, Notes for a Law Lecture, *in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 302 (Fred R. Shapiro ed., 1993) ("As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."); Joshua A. Darrell, *For Many, Litigation Retains Important Practical Benefits*, NAT'L L. J., Apr. 11, 1994, at C11 (discussing benefits of alternative dispute resolution).

43. CHARLES DICKENS, BLEAK HOUSE 51 (Norman Page ed., Penguin Books 1971) (1853) (quotation marks omitted).

44. Judges sometimes receive criticism if they ask, or let juries ask, too many questions of witnesses. *See* United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (commenting on popular notion that limited questioning by trial judge guards against bias); United States v. Ajmal, 67 F.3d 12, 14-15 (2d Cir. 1995) (discussing dangers of prejudice and compromise of juror neutrality in juror questioning of witnesses); *see also* Bill Alden, *Juror Inquiries Require Retrial for Defendant*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting how improper juror questioning in *Ajmal* case led to reversal and new trial). In today's media-dominated world, jurors are more informed about legal issues than ever before. More explanation by judges why certain legal principles are important or why certain evidentiary rulings have been made may be helpful to contain speculation that can lead juries astray. Similarly, if jurors ask questions that seek to clarify evidence, and if the practice is properly controlled, this may preserve rather than interfere with a jury's impartiality.

45. Winston Churchill, Speech (Nov. 11, 1947), *in* THE OXFORD DICTIONARY OF QUOTATIONS 202 (Angela Partington ed., 4th ed. 1992).

As we ponder how effective our legal system is, we must help create greater credibility in existing, useful mechanisms. A number of years ago, Judge Harold Rothwax of the Supreme Court of the State of New York noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them.[46] In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was offered one in New York.[47] Similarly, we recently have heard much about the police practice of tailoring testimony to avoid the suppression of evidence, an apparently common practice that must be known to, or at least suspected by, some prosecuting attorneys.[48] Often, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate either the law itself or the role and quality of work performed by lawyers in the fields, for example, of personal injury or criminal defense. Lawyers have also unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases.[49]

The response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns at the same time as we challenge overreactions that undermine the principles of our judicial system.[50] For example, legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases.[51] But to do this is inconsistent with the premise of the jury system. The focus must be shifted back to monitoring frivolous claims, uncovering pervasive misrepresentation in court, and educating the public that no system of justice is perfect. Despite occasional disappointing results, our system does have mechanisms in place that moderate jury verdicts (such as judges' discretion to set aside or reduce unreasonable verdicts), that allow for the discipline of lawyers, and

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46. *See Symposium: Ethics in Government*, CITY ALMANAC, Winter 1987, at 20, 20 (noting corruption in legal system succeeds when a few good people do nothing).

47. *See* Matthew Goldstein, *23 Lawyers Arrested in Insurance Scheme: Inflating of Settlements in Tort Cases Charged*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting praise of whistleblowing attorney who stated he "did what any honest citizen would do"); George James, *47 Accused in an Insurance Claim Scheme*, N.Y. TIMES, Sept. 22, 1995, at B3 (describing district attorney's praise of lawyer as "credit to the legal profession and the general public").

48. *See And What About Justice?*, WALL. ST. J., Sept. 1, 1995, at A6 (discussing perjury by law enforcement officers in O.J. Simpson trial and on Philadelphia police force); *see also* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 63-65 (1996) (discussing problems exclusionary rule creates for law enforcement officers).

49. *See Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 (publishing attorney's criticism of criminal trials as "indistinguishable from Roman circuses").

50. *Cf. supra* note 47 and accompanying text (describing efforts of New York attorney exposing fraudulent practices by plaintiffs' personal injury attorneys).

51. *See* Common Sense Product Liability Legal Reform Act of 1996, H.R. 481, 104th Cong. (limiting punitive damages in certain cases).

that can result in punishment of perjurers.[52]

Criminal law is the most challenging arena in which to satisfy the public that our system adequately addresses problems of apparently wrong verdicts. This is largely because the public either does not understand or does not accept the necessity for safeguards against sometimes overzealous prosecution and the protection of certain civil liberties. The role of criminal defense lawyers in particular is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors and government officials should be especially sensitive to and publicly supportive of the fundamental place constitutional safeguards and the defense bar have in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues who perform essential functions in asserting and protecting constitutional rights.[53]

If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. For example, in New York State, a recent study of the matrimonial bar concluded that a very significant negative sense exists of matrimonial practice, based on the perception that matrimonial lawyers often take unfair financial advantage of emotionally fragile clients.[54] Similarly, California found that sexual exploitation of clients

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52. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2214 (1996) (applying New York check on excessive damages to federal court); Bender v. City of New York, 78 F.3d 787, 794-95 (2d Cir. 1996) (finding verdict of $300,700 excessive in civil rights action); Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (finding $1.5 million verdict for pain and suffering excessive); *see also* 18 U.S.C. §§ 401-02 (1994) (granting courts power to punish contempt of courts' authority, including obstruction of justice); 18 U.S.C. § 1623 (1994) (criminalizing false declarations before any federal court or grand jury); FED. R. CIV. P. 11(c) (providing for sanctions of lawyers who pursue frivolous claims and needless litigation); Dunn v. United States, 442 U.S. 100, 107 (1979) (noting Congress enacted § 1623 to "facilitate perjury prosecutions and thereby enhance the reliability of testimony"). Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.

53. *See* Miranda v. Arizona, 384 U.S. 436, 480 (1966) (noting attorney carries out sworn duty by advising client to remain silent during police questioning). The *Miranda* Court emphasized that an attorney's advice of silence in the face of criminal investigation is an exercise of "good professional judgment," not a reason "for considering the attorney a menace to law enforcement." *Id.*; *see also* United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (noting that "fulfilling professional responsibilities 'of necessity may become an obstacle to truthfinding.'") (quoting *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting)).

54. *See* COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, ADMINISTRATIVE BD. OF THE COURTS OF N.Y., REPORT 1-5 (1993) (identifying criticism of divorce law system and proposing reforms and improvements for lawyers and courts); *see also Carpe Diem*, N.Y. L.J., Mar. 12, 1993, at 2 (citing report critical of divorce lawyers by New York City Department of Con-

was a pervasive enough problem in divorce and other areas of legal practice that the California Supreme Court passed a very hotly debated professional rule setting forth a lawyer's professional obligations in these situations.[55]

Whether the rule will have an effect in California on the public's perception of lawyers depends largely on how vigilantly their colleagues and others hold lawyers to the rule: Will lawyers actually be reported to the bar association when they are suspected of having inappropriate sexual relations with a client? How aggressively will they be investigated? And will they be held accountable if they continue to represent a client with whom they are having an impermissible sexual relationship?

Failure to enforce such a rule will again feed the public's mistrust, which arises in part from the sense that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, disciplinary proceedings have until recently been closed to protect lawyers from unjust criticism and harm to their reputations. Despite a recommendation by its Task Force on the Profession that these proceedings be made public, the House of Delegates of the New York State Bar Association has opposed the measure.[56] Unquestionably, unjust criticism of a professional can be devastating. But it is worth examining whether that concern is better addressed by creating a quick, fair process for determining whether a charge is unfounded than by continuing a practice of not airing complaints publicly.[57] Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to monitor them. One way or another, there must be convincing public justification for the manner in which discipline and performance are regulated.

In the political sphere, the sense that elected officials fail to police themselves is equally prevalent. Partisanship is the accepted "adversarial" mechanism that is supposed to maintain checks and balances and protect the public in various contexts, including in the fields of elections and campaign finance.[58] Bipartisan commissions, such as boards of elections

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sumer Affairs commissioner).

55. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-120 (1995) (prohibiting lawyer from engaging in sexual relations with a client in specific circumstances).

56. *See* Gary Spencer, *State Bar Opposes Any Public Discipline Procedures*, N.Y. L.J., June 27, 1995, at 1 (reporting bar association refused to endorse "even the smallest step toward opening" disciplinary process to public). The Association of the Bar of the City of New York has endorsed opening up these proceedings. *See* Committee on Professional Discipline, *The Confidentiality of Disciplinary Proceedings*, 47 REC. ASS'N B. CITY N.Y. 48, 60 (1992) (advocating opening process to public after determination that proceedings should begin).

57. Arguably, lawyers do not exhibit the same heightened sensitivity to the plight their clients suffer when unfair or embarrassing information becomes public through legal proceedings.

58. The Federal Election Commission is, for example, bipartisan by law. *See* 2 U.S.C. §

or most campaign finance agencies, often reflect a close relationship between commissioners and party politics. The result is often votes on individual matters along party lines rather than on the merits, and policies and procedures that favor the established parties over independent or alternative groups. By contrast, the experience of New York City's Campaign Finance Board—a pioneer agency regulating New York City's program of optional public financing of political campaigns—has been that of a deliberative, non-partisan board that nearly always acts unanimously and certainly always without regard to party affiliation. The non-partisan culture of that board is a model for decision-making in the political sphere. But few legislatures—including the federal Congress—are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, regulation of activity which is vital to the health of our democracy—including campaign finance activity—is largely administered by bipartisan agencies with weak claim to the public's trust.[59] The legislators' failure to submit themselves to meaningful scrutiny heightens cynicism about our elected officials, many of whom, as we all know, are lawyers.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of concluding legal and political conflicts. Next, we must find effective, confidence-building mechanisms for policing ourselves. Further, we must be prepared to entrust judgments on our own professional fitness not only to our colleagues, but to the public.

IV. THE RESPONSIBILITY OF OTHERS

The changing nature of the law and the conduct of lawyers give the public understandable pause. We must not, however, fall prey to the public's cynicism. We must instead expect more of our profession. There is a limit to how far an individual lawyer can elevate the bar as a whole. What a lawyer can do, as argued above, is educate the public—at the very least in the person of his or her clients—and personally raise standards by living up to a code of conduct beyond what is "enforceable." This responsibility is not confined to attorneys in private practice. The others who operate in or around the legal framework—judges, prosecutors, juries, witnesses, public officials, and the press—must also educate themselves, and others, and apply higher standards of conduct to their own behavior.

Much distrust arises from a lack of understanding, whether about the

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437c(a)(1) (1994) (providing that only three of six members appointed to Commission "may be affiliated with the same political party").

59. *See* Charisse Jones, *Old-Style Board Faulted After Botched Voting*, N.Y. TIMES, Oct. 12, 1996, at 25 (reporting criticism of local bipartisan board of elections as "mismanaged" and "crippled" by political appointments).

purpose and role of the adversary system, the presumption of innocence, the right of every party to be represented by an attorney, or the facts and proceedings of a specific case—even a case as highly publicized as the O.J. Simpson trial. The limitations of the law are also poorly understood. We need the help of the schools, our media, and our public officials to communicate the values and limitations of our system of justice and to free us from simplistic analysis that breeds contempt.

What we should also acknowledge, to broaden the true reach of the law's majesty, is the role that many influences, including the press and the lay public, play in contributing to our intricate legal system.

V. CONCLUSION

What we propose is as follows:

> *First*, lawyers must make a greater effort at educating themselves, their clients, and the public about the key underpinnings of our legal system: the reasons for the law's uncertainty; the values and limitations of the adversary system; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals.
>
> *Second*, we must re-examine what does and does not work to bring about justice and consider whether we can improve aspects of our system. Is the adversary process the best way of determining whether witnesses are telling the truth or for dealing with the "battle of the experts"? If not, let us improve what we have, or find a better way, recognizing that we cannot achieve perfection.
>
> *Third*, we must instill among ourselves and our public officials a culture of a high morality, as best we can. We must determine what ethical guidelines are appropriate and then enforce them seriously. We must adopt concrete ways to recognize those among us who practice law and serve the public at the highest moral levels. We must combine to act more honorably both within our own sphere and collectively as a profession, supporting each other in the inevitable controversies that arise when lawyers and government officials properly carry out responsibilities that are ill understood by the public.
>
> *Finally*, we must enlist not only every group of our profession, including judges, lawyers, legislators, and other public officials, to adhere to higher standards. We must also enlist clients, jurors, journalists, and all our fellow citizens, because we are all touched by the law, and we can all have an influence on how it evolves.

We cannot delay in addressing these moral issues of professional and political conduct. We are faced with on-going instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession and government officials to public scorn and ridicule. The response, if we do not act,

will be an increasing amount of legislation criminalizing and otherwise regulating conduct and a demoralization in the practice of law and public service. We are losing many fine elected officials to retirement who no longer care to operate in a bitterly partisan and hostile atmosphere governed by few meaningful rules of conduct and subject to heightened and unrelenting personal scrutiny by the press. Among our own ranks, senior practitioners complain bitterly of the loss even of professional courtesy among lawyers and office holders.

In Boston, lawyers call their adversaries "brother" or "sister" in court. Anyone who experiences the practice appreciates the grace it adds to the proceedings. This grace is created by the aura of respect the titles seek to convey. In light of the increasing call by lawyers to return to greater professional civility, it is clear we ourselves feel and regret the loss of professional courtesy and respect.[60] We must first give respect to each other and to the profession—in word and in deed—before we can expect the public to do so.

If we act in these areas, the public discourse, the behavior of our lawyers and public officials as well as their reputations, and, ultimately, confidence in our legal and political systems will be greatly enhanced.

60. *See* Louis P. DiLorenzo, *Civility and Professionalism*, N.Y. ST. B.J., Jan. 1996, at 8, 8-10, 25 (exploring scope of decline in professionalism among attorneys, uncovering its cause, and suggesting possible solutions); *see generally* NEW YORK STATE BAR ASS'N, CIVILITY IN LITIGATION: A VOLUNTARY COMMITMENT (1995) (explaining suggested guidelines for behavior of all participants in litigation process).

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002b. form	Senate Questionnaire (28 pages)	05/12/1997	P2, P6/b(6)

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